Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-818

COMMERCIAL NATIONAL BANK OF DALLAS,
Intervenor-Petitioner
ONE 1974 CADILLAC AUTOMOBILE,
SERIAL NUMBER 6D47R4Q192230,
Defendant

versus

UNITED STATES OF AMERICA,
Plaintiff-Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INDEX

	PAGE NO.
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions & Statutes Involved	2
Statement of the Case	3
Statement of the Facts	3
Reasons for Granting the Writ	5
I Whether the forfeiture to the United States of a vehicle under the provisions of 49 USC §781, 782 is unconstitutional when applied to an innocent lienholder and the courts below erred in not so holding	5
II Whether a District Court may judicially review the District Director of Customs' denial of Petition for Remission of Forfeiture and find such to be an error of judgment and the courts below erred in not so holding	10
Conclusion	14
Certificate of Service	15

CITATIONS

PAGE NO.

Cases:

Brown v. Allen, 344 U.S. 443, 73 S.Ct. 397, 97 L. Ed. 469 (1953) 9

Calero-Toledo v. Pearson Yacht Leasing Company, 416 U.S. 663, 94 S.Ct. 2080, 40 L.Ed. 2d 452 (1974) 7

Citizens to Preserve Overton Park v. Volte, 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed. 2d 136 (1971) 11

Davis v. Secretary, Department of Health, Education & Welfare, 262 F. Supp. 124, (D. Md. 1967) 13

Fidelity Television, Inc. v. F.C.C. 502 F.2d 443 (D.C. Cir. 1974) 13

International Ry. Co. v. Bradley, 65 F.Supp. 58, (D. N.Y., 1945) 8

Mount Siani Hosp. of Greater Miami, Inc. v. Weinberger, 376 F.Supp. 1099, (S.D. Fl., (1974)) 13

Stevenson v. Richardson County, Nebraska, 9 F.R.D. 437, (D. Nebr. 1949) 8

CITATIONS (continued)

PAGE NO.

United States v. One 1972 Mercedes-Benz 250, Etc., 545 F.2d 1233 (9th Cir. 1976) 9

United States v. One 1969 Plymouth Fury Automobile, 476 F.2d 960, reh. den. 509 F.2d 1324 (5th Cir. 1973), cert. den. 423 U.S. 838 9

United States v. One 1974 Mercury Cougar Automobile, XR7, Etc., 397 F.Supp. 1325 (C.D. Calif., 1975) 12

Statutes:

5 U.S.C. § 701 11

19 U.S.C. § 1618 ..... 8, 11, 12

49 U.S.C. § 781, 782 2,5,11,14

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1977

NO.

COMMERCIAL NATIONAL BANK OF DALLAS,
Intervenor-Petitioner

ONE 1974 CADILLAC AUTOMOBILE, SERIAL NUMBER 6D47R4Q192230,
Defendant

VS.

UNITED STATES OF AMERICA,
Plaintiff-Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, Commercial National Bank of Dallas, prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit in these proceedings on September 12, 1977.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, which is unreported, appears at Appendix "A", infra, Pages 1, 2, 3 & 4. The Order and Judgment of the United States District Court for the Northern District of Texas, which is unreported, appears at Appendix "A", infra, Pages 5, 6 & 7.

JURISDICTION

The Judgment of the United States Court of Appeals for the Fifth Circuit was entered on September 12, 1977, pursuant to Rule 36 of F.R.A.P. See Appendix "A", infra. This Petition for Certiorari was filed less than 90 days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Rule 19 of the Supreme Court Rules.

QUESTIONS PRESENTED

I. Whether the forfeiture to the United States of a vehicle under the provisions of 49 USC § 781, 782 is unconstitutional when applied to an innocent lienholder and the courts below erred in not so holding.

II. Whether a District Court may judicially review the District Director of Customs' denial of Petition for Remission of Forfeiture and find such to be an error of judgment and the courts below erred in not so holding.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States, Amendment V:

No person shall be ... deprived of ... property, without due process of law; nor shall private property be taken for public use without just compensation.

The relevant portion of all statutes involved are set forth in Appendix "B".

Statement of the Case

The United States of America instituted an *in rem* action against a 1974 Cadillac Automobile seeking to have it forfeited to the United States because the driver had possessed and concealed on his person two (2) counterfeit twenty dollar ($20.00) Federal Reserve Notes while driving the defendant vehicle. The Commercial National Bank of Dallas, lienholder of the vehicle, intervened alleging that such seizure and forfeiture was unconstitutional, when applied to an innocent lienholder, and that the District Court should find that the District Director of Customs abused his discretion when he refused to release said vehicle to Commercial National Bank of Dallas. The District Court denied relief to the Bank on either ground and ordered the vehicle condemned and forfeited to the United States, and on appeal, the United States Court of Appeals for the Fifth Circuit affirmed the District Court.

Statement of the Facts

(1) On or about October 30, 1974, Jimmy E. Ercanbrack executed a Promissory Note in the Original principal sum of $4,500.00 to Commercial National Bank of Dallas, and as collateral for said Note, executed a Security Agreement, granting to Intervenor a security interest in one 1974 Cadillac automobile, Serial No. 6D47RQ192230. (R. Vol. I 15-16).*

(2) On or about December 3, 1974, the State of Texas issued Title No. 69137848 to Jim Ercanbrack and delivered said title to Commercial National Bank of Dallas showing same as lienholder. (R. Vol. I, P. 17.)

---

*References are to the original record.

(3) On or about October 30, 1975, Commercial National Bank of Dallas received notice that the United States Secret Service had seized the above vehicle in that it was used to transport counterfeit Federal Reserve Notes. (R. Vol. I, P. 16.)

(4) On or about November 18, 1975, Commercial National Bank of Dallas filed a Petition for Release with the Commissioner of Customs requesting release of the vehicle. (R. Vol. 1,P. 19-20.)

(5) The District Director of Customs, acting for the United States of America, refused to release the vehicle unless Commercial National Bank of Dallas made payment of $3,221.14 to The United States Customs Service, made payment of all storage charges, furnish an instrument to the United States Customs Service executed by the registered owner of the said property releasing their interest in such property, and furnish to same an agreement to hold the government, its agents and employees harmless from any claim which might result from the proceeding. (R. Vol. I, P. 21.)

(6) The balance, on the Promissory Note executed by Jimmy E. Ercanbrack, owing to the Bank at the time the bank filed its Petition for Release was $3,697.60 and by March of 1976 was $3,730.49 while the value of the vehicle at the time the Bank filed its Petition for Release was approximately $4,735.00. (R. Vol. I, P. 19- Vol. II, P. 18 & 19.)

(7) On May 6, 1976, the United States of America filed a Complaint against One 1974 Cadillac Automobile, Serial No. 6D47R4Q192230, seeking forfeiture of said vehicle to

the United States. (R. Vol. I, P. 3, 4 & 5.)

(8) On May 19, 1976, Commercial National Bank of Dallas filed a Motion to Intervene with Order and on May 21, 1976, a Petition in Intervention was filed by the Bank seeking release of the vehicle. (R. Vol. I, P. 9-21.)

(9) An evidentiary hearing was held on January 27, 1977 in the District Court for the Northern District of Texas and on the same date that Court ordered that one 1974 Cadillac Automobile, Serial No. 6D47R4Q192230, be condemned and forfeited to the United States. (R. Vol. I, P. 66 & 67.)

(10) On February 23, 1977, Commercial National Bank of Dallas filed its Notice of Appeal. (R. Vol. I, P. 68.)

(11) On September 12, 1977, the United States Court of Appeals for the Fifth Circuit affirmed the District Court. (Appendix "A", infra, P. 1, 2 & 3.)

REASONS FOR GRANTING THE WRIT

THE FIRST QUESTION (RESTATED)

Whether the forfeiture to the United States of a vehicle under the provisions of 49 USC § 781, 782 is unconstitutional when applied to an innocent lienholder and the courts below erred in not so holding.

Petitioner does not contend that the forfeiture statutes found in Title 49, U.S.C. § 781 and 782 are on their face unconstitutional, but would show that they become uncon-

stitutional when applied to an innocent party. Respondent has admitted "that the Intervenor, Commercial National Bank, had no actual prior or contemporaneous knowledge that the defendant vehicle was being used or would be used in violation of law. ..."(R. Vol. I. P. 63A.P.30) Furthermore, Petitioner has demonstrated through the testimony of Raymond Morrow, President of Commercial National Bank at the time the loan was made, that the Bank did all that it could reasonably be expected to do to make sure that the vehicle would not be used in an illegal fashion such as carrying contraband. The Bank followed standard banking procedures in investigating the customer and monitored the loan and customer until the vehicle was seized. (R. Vol. II, P. 10-27, A. P. 32-49.) Finally, the District Court itself stated the following:

> "Now, in this case, I think the *Bank is perfectly innocent.* I don't think it has participated in any way in the offense for which the vehicle was seized." (A. P. 62.) (Emphasis supplied.) (R. Vol. II, P. 53)

Nevertheless, after concluding the above, the District Court ruled in favor of the United States and condemned the vehicle. It stated as follows:

> "... But I think this Court ... must follow the law as it's laid down by the majority of the Fifth Circuit until it's either changed by Congress or by that Court or by the Supreme Court.
>
> So, with regret, I must render judgment for the Government in this case. I wish the Bank, I hope

> the Bank will take it up." (R. Vol. II, P. 54, A. P. 63)

Subsequently, the United States Court of Appeals for the Fifth Circuit affirmed the District Court. However, both Courts erred, for the law has been changed by this Court in *Calero-Toledo V. Pearson Yacht Leasing Company,* 416 U. S. 663, 94 S. Ct. 2080, 40 L.Ed. 2d 452 (1974), where the Court stated:

> "This is not to say, however, that the 'broad sweep' of forfeiture statutes remarked in *Coin & Currency* could not, in other circumstances, give rise to serious constitutional questions. Mr. Chief Justice Marshal intimated as much over a century and a half ago in observing that 'a forfeiture can only be applied to those cases in which the means that are prescribed for the prevention of the forefeiture may be employed.' (Citation omitted.) *It therefore has been implied that it would be difficult to reject the constitutional claim of an owner whose property subjected to forfeiture had been taken from him without his privity or consent.* (Citations omitted.) *Similarly, the same might be said of an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property; for, in that circumstance; it would be difficult to conclude that the forfeiture served legitimate purposes and was not unduly oppressive." (Citations omitted.)* 416 U.S. at 688, 94 S.Ct. at 2094 (Emphasis Supplied.)

Petitioner clearly fits into the above Supreme Court language and thus is being unconstitutionally deprived of its property. Respondent has called the above language dictum and points to the decision in the Pearson case which upheld a forfeiture statute. However, first, assuming the observation is correct that such language is dicta, it has been said "that the considered reasoning of a court of final resort upon a proposition before it, though not necessary to the decision arrived at, is not, and has never rightly been considered to be, mere obiter dictum, but is respectfully to be regarded by the judge of the inferior courts in arriving at their conclusions upon problems to which it is pertinent." *Stevenson v. Richardson County, Nebraska*, 9 F.R.D. 437, 446,447(D. Nebr. 1949). See also *International Ry. Co. v. Bradley*, 65 F.Supp. 58, 59 (D. N.Y., 1945) where the Court stated that dicta of the United States Supreme Court "has strong persuasive influence on the lower courts." Second, it is true that in *Pearson* a yacht was forfeited under Puerto Rico forfeiture statutes which was held constitutional by the United States Supreme Court. However, the Court drew an important distinction between the Puerto Rican statutes and the Federal statutes in that the federal statutes must be read with the federal remission statute 19 U.S.C. §1618. The remission statute requires forfeiture *only* from persons "significantly involved in criminal enterprise," and the Court pointed out that no such similar remission statute exists in the Puerto Rican forfeiture statutes to protect innocent owners. Thus, the earlier cases denying relief to innocent owners from forfeiture statutes were held applicable to Puerto Rico's remissionless forfeiture statutes. Consequently, the above quoted language from *Pearson* is applicable to the present case and the District Court erred in not following it.

Respondent and the Court of Appeals for the Fifth Circuit have referred to *United States v. One 1969 Plymouth Fury Automobile*, 476 F.2d 960, reh. den. 509 F.2d 1324 (5th Cir., 1973), cert den. 423 U.S. 838 as being on point. (R. Vol. I, A. P. 61-63.) That case is similar to the instant case and the Fifth Circuit did uphold the forfeiture statutes as constitutional. However, the case was decided before the United States Supreme Court issued its opinion in the above quoted *Pearson* case. The fact that the Fifth Circuit denied a rehearing of the case after *Pearson* is irrelevant since such a decision merely indicates that a majority of the Circuit Judges who were in regular active service at the time chose not to vote for a rehearing for unstated reasons not necessarily related to the merits of the case. Neither does the fact that this Court also denied certiorari of the case after *Pearson* have any significance as is indicated by the following language from *Brown V. Allen*, 344 U.S. 433,492, 73 S.Ct. 397,437, 97 L. Ed. 469 (1953).

> "We have repeatedly indicated that a denial of certiorari means only that, for one reason or another which is seldom disclosed, and not infrequently for conflicting reasons which may have nothing to do with the merits and certainly may have nothing to do with any view of the merits taken by a majority of the Court, there were not four members of the Court who thought the case should be heard."

Additionally, it is of interest to note that the Ninth Circuit Court of Appeals has recognized the fresh impact of the language in the *Pearson* case. In *United States v. One 1972 Mercedes-Benz*, 250, Etc., 545 F.2d 1233, 1236 (9th Cir. 1976) that Court stated:

> "But as was further noted in *Pearson Yacht Leasing*, there are indications that serious constitutional problems could arise where the claimant can prove that he was uninvolved and unaware of the unlawful activity and not guilty of any negligence which permitted it."

Certainly, in light of the above and especially the language in *Pearson* this Court should re-examine the forfeiture statutes as applied to innocent parties. Your Petitioner should be relieved from an absurd rationale which Judge Wisdom, with whom four other honorable judges of the United States Court of Appeals of the Fifth Court all joined, called "barbaric, a vestigal relic of deodand." *United States v. One 1969 Plymouth Fury Automobile, Etc.*, 509, F.2d 1324, 1325 (5th Cir. 1975.)

REASONS FOR GRANTING THE WRIT

THE SECOND QUESTION (RESTATED)

> Whether a District Court may judicially review the District Director of Customs' denial of Petition for Remission of Forfeiture and find such to be an error of judgment and the courts below erred in not so holding.

Respondent, United States of America, has contended that there was no denial of Petitioner's Petition for Remission of Forfeiture but that such Petition was "conditionally granted." Such a contention is based on semantics, for the District Director of Customs conditioned release upon the payment by Petitioner of $3,221.14, plus all storage fees, and the meeting of other demands.(R. Vol. I, P. 21,

A. P. 18.) Such an amount closely approximates the interest owned in the vehicle by Petitioner and approaches the value of the defendant vehicle itself. A conditioned release of this nature constitutes a denial of Petitioner's Petition for Remission whether it is called a denial or not.

Petitioner urges that the District Court had jurisdiction under the provisions of the Administrative Procedure Act, 5 U.S.C. §551 *et seq* as construed by recent case authority to review the denial of a petition for remission. Section 701 of the Act provides that the judicial review is not permitted when "(1) status precludes judicial review; or (2) agency action is committed to agency discretion by law." 19 U.S.C. §1618 does not preclude judicial review and the issue therefore becomes whether, under 49 U.S.C. §781 and 782, action of the District Director of Customs is "committed to agency discretion by law."

This Court, in *Citizens to Preserve Overton Park v. Volte*, 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed. 2d 136 (1971), has stated that there is no commitment to agency action where words exist in the stature constituting "law to apply." In that case the Supreme Court found that there was "law to apply" (and consequently, judicial review applicable) in a statute that gave the governmental agency a guideline or standard to apply to the fact situation in arriving at its administrative decision. This Court further found that in the statute involved, the words "feasible and prudent" furnished the agency with sufficient standards to constitute "law to apply." 19 U.S.C. §1618 states:

> "... (the agency)... may remit or mitigate... upon such terms and conditions as he deems *reasonable and prudent*...(when the agency finds

> that the petitioner is)...without willful negligence or *without any intention to defraud or to violate the law*... (emphasis added)

It can be argued that the above language sets out a standard or "law to apply" at least equivalent to the "reasonable and prudent" language which this Court has specifically ruled as constituting sufficient grounds for judicial review.

This line of reasoning was used in a very recent case with a fact situation very similar to the instant situation, where the Court stated:

"It seems to this Court that 19 U.S.C. § 1618 is not a statute drawn in such a broad terms that there is no law to apply. Certainly, the provisions that the Attorney General may remit or mitigate...upon such terms and conditions as he deems just' may be construed as a commitment to agency discretion. The phrases 'without willful negligence' and 'without any intention on the part of petitioner to defraud the revenue or to violate the law' do, however, constitute 'law to apply' in that they provide identifiable standards and guidelines. Viewed in its entirety, therefore, this Court believes that §1618 does not fall within the narrow exception provided in Section 701 (2) of the Administrative Procedure Act." (Citation omitted.) *United States v. One 1974 Mercury Cougar Automobile, XR 7, Etc.*, 397 F. Supp. 1325 at 1331 (C.D. Calif., 1975)

The same court concluded that the denial of the Petition for Remission "was a clear bause of discretion and an error of judgment in that it ran counter to the statutory delegation of authority in § 1618 and to the Attorney General's own regulations."

Petitioner asserts, therefore, that as a matter of law, the District Court did have the power to review an effective denial of Petition for Remission and that in the instant case the denial to Petitioner was defective and an abuse of discretion.

Finally, Respondent has argued that appellant has failed to exhaust Administrative appeal and, therefore, should not be entitled to relief from this Court under the Administrative Procedure Act. Assuming that appellant did not exhaust Administrative appeal the District Court could still intervene and grant relief since "an agency order need not be the very last administrative ruling in order to be deemed a final one." *Mount Sinai Hosp. of Greater Miami, Inc., v. Weinberger,* 376 F.Supp. 1099, 1118 (S.D. Fl., 1974) reversed on other grounds 517 F.2d 329. See also *Davis v. Secretary, Department of Health, Education & Welfare,* 262 F. Supp. 124, 126 (D. Md., 1967) where the court stated that the rule of exhaustion "is not, ...one of unvarying application and the courts have not so treated it." In addition, consider *Fidelity Television, Inc. v. F.C.C.*, 502 F. 2d 443 (D.C. Cir. 1974).

It is respectfully submitted that the above analysis makes clear that the District Court should have reviewed Petitioner's Petition for Remission of Forfeiture and that denial of said Petition by the District Director of Customs was an abuse of discretion.

CONCLUSION

The District Court and United States Court of Appeals for the Fifth Circuit erred in refusing to find that the forfeiture to the United States of a vehicle under the provisions of 49 U.S.C. §781, 782 is unconstitutional when applied to an innocent lienholder. Recent language by this Court requires such a view.

The District Court and United States Court of Appeals for the Fifth Circuit also erred as a matter of law in refusing to judicially review the District Director of Customs' denial of Petitioner's Petition for Remission of Forfeiture and to find such denial to be an error of judgment.

WHEREFORE, Petitioner prays that a Writ of Certiorari be granted and that after briefing and oral argument the cause be reversed and rendered with instructions that the United States of America release One 1974 Cadillac Automobile, Serial Number 6D47R4Q192230, and deliver it to Petitioner in order that Petitioner might satisfy its interest in said vehicle.

Respectfully submitted,

FIEDLER AND FORTESCUE

BY: _____

Donald A. Muncy
600 First Bank & Trust Bldg.
Richardson, Texas 75080
(214) 690-8015

CERTIFICATE OF SERVICE

On December 6th, 1977, affiant served the attached Petition for a Writ of Certiorari for Petitioner upon Mr. William F. Sanderson, Jr., Assistant United States Attorney, by depositing three (3) thereof to such attorney, enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail box in Dallas, Texas, addressed to such attorney at his address of 1100 Commerce, Room 16G28, Dallas, Texas 75242, and that Mr. William F. Sanderson, Jr., has his office at a place where there is a delivery service by United States mail, and that there is a regular communication by mail between the place of mailing and the places so addressed.

_____
Donald A. Muncy

APPENDIX

APPENDIX A

MEMORANDUM TO COUNSEL

United States Court of Appeals
Fifth Circuit

Edward W. Wadsworth
Clerk

Office of the Clerk
September 12,1977

600 Camp St.
New Orleans,
Louisiana 70130

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 77-1534 - U.S.A. VS. One 1974 CADILLAC AUTOMOBILE, etc. ET

Dear Counsel:

Enclosed is a copy of the Court's opinion this day rendered in the above case. A judgment has this day been entered in accordance therewith pursuant to Rule 36 of the Federal Rules of Appellate Procedure.

Rules 39, 40 and 41, F.R.A.P., govern costs, petitions for rehearing and mandates, respectively. *A petition for rehearing must be filed in the Clerk's Office within 14 days from this date. Placing the petition in the mail on the 14th day will not suffice.*

Local Rule 15 provides that "A motion for a stay of the issuance of a mandate in a *direct criminal appeal* filed under F.R.A.P. Rule 41 shall not be granted simply upon request. Unless the petition sets forth good cause for stay or clearly demonstrates that a substantial question is to be presented

to the Supreme Court, the motion shall be denied and the mandate thereafter issued forthwith."

If you are court-appointed counsel, your attention is called to Local Rule 7 which provides: "Appointed counsel shall, in the event of affirmance or other decision adverse to the party represented, promptly advise him in writing of his right to seek further review by the filing of a petition for writ of certiorari with the Supreme Court, and shall file such petition, if requested by such party in writing to do so."

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

By: S/ Doria Call
Deputy Clerk

enc.
cc: Mr. Donald A. Muncy
Mr. William F. Sanderson

OPINION OF UNITED STATES CIRCUIT COURT OF APPEALS

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 77-1534
Summary Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee

versus

ONE 1974 CADILLAC AUTOMOBILE
SERIAL NO. 6D47R4Q192230
Defendant

COMMERCIAL NATIONAL BANK,
Intervenor-Appellant

Appeal from the United States District Court for the Northern District of Texas

(September 12, 1977)

Before THORNBERRY, RONEY and HILL, Circuit Judges.

PER CURIAM:

Jimmy Ercanbrack, the titled owner of the 1974 Cadillac involved in this case, was arrested in the vehicle while in possession of counterfeit $20 Federal Reserve notes. He

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*Rule 18, 5 Cir., see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir. 1970, 431 F.2d 409.

subsequently pled guilty to possession of the bogus bills, an offense under 18 U.S.C. § 472, and the government then filed a forfeiture complaint against the vehicle pursuant to 49 U.S.C.§§781 and 782.

Appellant Commercial National Bank of Dallas, which held a lien on the vehicle, intervened for its security interest. The district court ordered forfeiture of the vehicle. We affirm.

The appellant argues that the forfeiture statute is unconstitutional as applied to it, an innocent lienholder. This position is untenable in light of United States v. One 1969 Plymouth Fury, 476 F.2d960 (5th Cir. 1973), *rehearing en banc denied*, 509 F.2d 1324 (5 Cir. 1975), *cert. denied*, 423 U.S. 838 (1975). Appellant also contends that the district court should have reviewed the decision of the district customs director, acting for the Secretary of the Treasury, denying the intervenor's petition for remission of forfeiture. *See* 19 U.S.C. § 1618. This argument lacks merit. United States v. One 1970 Buick Riviera, 463 F.2d 1168 (5 Cir.), *cert. denied*, 409 U.S. 970 (1972); United States v. One 1972 Mercedes-Benz 250, 545 F.2d 1233 (9 Cir. 1976).

The decree of forfeiture is AFFIRMED.

ORDER AND DECREE OF CONDEMNATION

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Filed: January 27, 1977

UNITED STATES OF AMERICA
Plaintiff

V. CIVIL ACTION
NO. 3-76-0646-C

ONE 1974 CADILLAC AUTOMOBILE
SERIAL NO. 6D47R4Q192230
Defendant

ORDER AND DECREE OF CONDEMNATION

The Court having considered the pleadings and affidavits, together with the testimony and exhibits received in the evidentiary hearing held on January 27, 1977, as well as the oral argument of counsel for the parties, is of the opinion and so finds that:

(1) That the said 1974 Cadillac automobile, Serial No. 6D47R4Q192230 was used in Dallas, Dallas County, Texas on October 2, 1975, to facilitate the transportation, carriage, conveyance, concealment, and possession of contraband articles, to wit: counterfeit Federal Reserve notes possessed and concealed in violation of Title 18, United States Code, Section 472, all in violation of Title 49, United States Code, Section 781.

(2) That the intervenor, Commercial National Bank of Dallas, has failed to establish a legal defense to the claim of the United States, plaintiff herein, under the case law of the Court of Appeals for the Fifth Circuit.

It is, therefore, ORDERED, ADJUDGED and DECREED that the said defendant vehicle, to wit: one 1974 Cadillac Automobile, Serial No. 6D47R4Q192230, be and the same is hereby condemned and forfeited to the United States.

It is further ORDERED that the United States Marshal be and is hereby directed to release the said defendant vehicle to the Special Agent in Charge, United States Secret Service, Room 8E3, Earl Cabell Federal Building, 1100 Commerce Street, Dallas, Texas, pursuant to the application for delivery of seized property on file in this *in rem* action.

ENTERED this 27th day of January, 1977.

s/ W. M. Taylor, Jr.
United States District Judge

JUDGMENT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Filed: July 7, 1977

UNITED STATES OF AMERICA

vs. CA 3-76-0646-C

ONE 1974 CADILLAC AUTOMOBILE
SERIAL NO. 6D47R4Q192230

JUDGMENT

This action came on for trial before the Court, Honorable W. M. Taylor, Jr., District Judge, presiding and the issues having been duly tried and a decision having been duly rendered,

It is ORDERED, ADJUDGED and DECREED that defendant vehicle, to wit: one 1974 Cadillac Automobile, Serial No. 6D47R4Q192230 be and the same is hereby condemned and forfeited to the United States.

It is further ORDERED that the United States Marshal be and he is hereby directed to release said defendant vehicle to the Special Agent in Charge, United States Secret Service, Room 8E31, 1100 Commerce Street, Dallas, Texas.

Ordered entered the 27th day of January, 1977, this 7th day of July, 1977.

s/ W. M. Taylor, Jr.
United States District Judge

APPENDIX B

STATUTES INVOLVED

5 U.S.C.§ 701. Application; definitions

(a) This chapter applies, according to the provisions thereof, except to the extent that --

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

19 U.S.C. § 1618. Remission or mitigation of penalties

Whenever any person interested in any vessel, vehicle, merchandise, or baggage seized under the provisions of this chapter, or who has incurred, or is alleged to have incurred, any fine or penalty thereunder, files with the Secretary of the Treasury if under the customs laws or under the navigation laws, before the sale of such vessel, vehicle, merchandise, or baggage a petition for the remission or mitigation of such fine, penalty, or forfeiture, the Secretary of the Treasury, if he finds that such fine, penalty, or forfeiture was incurred without willful negligence or without any intention on the part of the petitioner to defraud the revenue or to violate the law, or finds the existence of such mitigating circumstances as to justify the remission or mitigation of such fine, penalty, or forfeiture, may remit or mitigate the same upon such terms and conditions as he deems reasonable and just, or order discontinuance of any prosecution relating thereto. In order to enable him to ascertain the facts, the Secretary of the Treasury may issue a commission

to any customs officer to take testimony upon such petition: *Provided*, That nothing in this section shall be construed to deprive any person of an award of compensation made before the filing of such petition. As amended June 2, 1970, Pub. L. 91-271, Title III, § 301 (hh), 84 Stat. 291.

49 U.S.C. §781. Unlawful use of vessels, vehicles, and aircrafts; contraband article defined

(a) It shall be unlawful (1) to transport, carry, or convey any contraband article in, upon, or by means of any vessel, vehicle, or aircraft; (2) to conceal or possess any contraband article in or upon any vessel, vehicle, or aircraft; or (3) to use any vessel, vehicle, or aircraft to facilitate the transportation, carriage, conveyance, concealment, receipt, possession, purchase, sale, barter, exchange, or giving away of any contraband article.

(b) As used in this section, the term "contraband article" means --

(1) Any narcotic drug which has been or is possessed with intent to sell or offer for sale in violation of any laws or regulations of the United States dealing therewith; or which has been acquired or is possessed, sold, transferred, or offered for sale, in violation of any laws of the United States dealing therewith; or which has been acquired by theft, robbery, or burglary and carried or transported within any Territory, possession, or the District of Columbia, or from any State, Territory, possession, the District of Columbia, or the Canal Zone, to another State,

Territory, possession, the District of Columbia, or the Canal Zone; or which does not bear appropriate tax-paid internal-revenue stamps as required by law or regulations;

(2) Any firearm, with respect to which there has been committed any violation of any provision of the National Firearms Act or any regulation issued pursuant thereto; or,

(3) Any falsely made, forged, altered, or counterfeit coin or obligation or other security of the United States or of any foreign government; or any material or apparatus, or paraphernalia fitted or intended to be used, or which shall have been used, in the making of any such falsely made, forged, altered or counterfeit coin or obligation or other security.

Aug. 9, 1939, c. 618 § 1, 53 Stat. 1291; Aug. 9, 1950, c. 655, 64 Stat. 427.

49 U.S.C. §*782*. Seizure and forfeiture

Any vessel, vehicle, or aircraft which has been or is being used in violation of any provision of section 781 of this title, or in, upon, or by means of which any violation of said section has taken or is taking place, shall be seized and forfeited: *Provided,* That no vessel, vehicle, or aircraft used by any person as a common carrier in the transaction of business as such common carrier shall be forfeited under the provisions of this chapter unless it shall appear that (1) in the case of a railway car or engine, the owner, or

(2) in the case of any other such vessel, vehicle, or aircraft, the owner or the master of such vessel or the owner or conductor, driver, pilot, or other person in charge of such vehicle or aircraft was at the time of the alleged illegal act a consenting party or privy thereto: *Provided further,* That no vessel, vehicle, or aircraft shall be forfeited under the provisions of this chapter by reason of any act or omission established by the owner thereof to have been committed or omitted by any person other than such owner while such vessel, vehicle, or aircraft was unlawfully in the possession of a person who acquired possession thereof in violation of the criminal laws of the United States, or of any State. Aug. 9, 1939, c. 618, §2, 53 Stat. 1291.

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No. 77-818

In the Supreme Court of the United States

OCTOBER TERM, 1977

COMMERCIAL NATIONAL BANK OF DALLAS,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner, which holds a lien on a car, contends that the forfeiture of the automobile deprived it of property without due process of law or just compensation because it was not connected with the illegal acts that precipitated the forfeiture.

On June 24, 1974, Jimmy Ercanbrack bought a new Cadillac Coupe deVille automobile. The Midway National Bank financed the purchase and retained a security interest. On October 13, 1974, Ercanbrack defaulted on the loan and the automobile was repossessed by the bank, which advised Ercanbrack that he had until November 11, 1974 to pay off the entire loan or the car would be sold at auction (Tr. 28-30). Ercanbrack obtained

a second secured loan from petitioner and discharged his debt to Midway National Bank with a cashier's check from petitioner (Tr. 12 30-32).

On October 2, 1975, Ercanbrack was arrested and charged with possession of counterfeit reserve notes, in violation of 18 U.S.C. 472. The automobile, which had been used by Ercanbrack to transport the notes, was seized by the Secret Service for forfeiture. See 49 U.S.C. 781, 31 C.F.R. 401.1-401.3. Ercanbrack subsequently pleaded guilty.

Petitioner was notified of the seizure and filed a petition for remission, pursuant to 19 U.S.C. 1618. On February 11, 1976, the petition was conditionally granted by the District Director of Customs, the car being ordered released upon the payment of $3,221.14 plus reasonable storage charges (J.A. 18). Although requested to respond within 30 days of the decision, petitioner did not do so; nor did it file a supplemental petition for release or appeal the initial ruling to the Regional Commissioner of Customs as provided in the regulations. See 19 C.F.R. 171.33.

On May 6, 1976, forfeiture proceedings were instituted in the United States District Court for the Northern District of Texas. Petitioner intervened and sought possession of the automobile and remission of the forfeiture. At the hearing petitioner asserted that it had no knowledge that the automobile would be used in violation of the law and that it had done everything reasonably possible to avoid having its property put to an unlawful use. The government conceded that petitioner had no actual knowledge that the automobile was or would be used in violation of the law (J.A. 30), but argued that petitioner's negligence in making the loan facilitated the subsequent illegal use of the automobile. The government

showed that records maintained by the State District Court Clerk's Office and available for public inspection revealed that, at the time of the loan, Ercanbrack was on probation for two felony convictions—theft by false pretense (Tr. 26, 34-35, 37). Petitioner's president admitted that if the bank had known this, it would not have made the loan (Tr. 21, 24).

The district court ordered forfeiture (J.A. 64-65). The court determined that although petitioner was an innocent lienholder, its lack of knowledge or involvement in the proscribed use of the automobile was not a defense to a forfeiture action under 49 U.S.C. 782 (J.A. 62). The court of appeals affirmed *per curiam* (Pet. App. A3-A4).

1. Petitioner contends that the forfeiture of the automobile amounts to a deprivation of property without due process or just compensation since it had no knowledge that the car would be used for an illegal purpose and did everything reasonably in its power to prevent such use (Pet. 5-6).

This contention is foreclosed by *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663. *Calero-Toledo* holds that the forfeiture laws can constitutionally be applied to the property of an owner who was not aware of or involved in the act subjecting the property to forfeiture. "[T]o the extent that such forfeiture provisions are applied to lessors, bailors, or secured creditors who are innocent of any wrongdoing, confiscation may have the desirable effect of inducing them to exercise greater care in transferring possession of their property" (*id.* at 687-688). See also *United States* v. *One 1969 Plymouth Fury Automobile*, 476 F. 2d 960 (C.A. 5), rehearing denied, 509 F. 2d 1324, certiorari denied *sub nom. Ford Motor Credit Company* v. *United States*, 423 U.S. 838; *United States* v. *One 1970 Buick Riviera*, 463 F. 2d 1168 (C.A. 5), certiorari denied *sub nom. National American Bank of*

New Orleans v. *United States*, 409 U.S. 980; *United States* v. *One 1967 Ford Mustang*, 457 F. 2d 931 (C.A. 9), certiorari denied *sub nom. Bank of American National Trust & Savings Assn.* v. *United States*, 409 U.S. 850.

To be sure, in *Calero-Toledo* the Court observed that "serious constitutional questions" might arise from the application of the forfeiture statutes to an owner who proved "not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property" (416 U.S. at 689). But that is not this case. While petitioner had no actual knowledge of Ercanbrack's criminal record, his background in commercial crime could easily have been uncovered by the examination of records readily accessible to the public. See *United States* v. *One 1967 Ford Mustang*, *supra*, 457 F. 2d at 932. Moreover, the evidence showed that petitioner violated its own lending policy by making a loan to pay off a debt on a car which it knew had been repossessed. In sum, had petitioner been more cautious, it would not find itself in its present situation.

2. Petitioner's additional contention that the district court erred in declining to review the decision of the District Director of Customs, which conditionally granted the release of the automobile, is likewise without merit (Pet. 10). It is well settled that the decision of the Attorney General or the Secretary of Treasury under 19 U.S.C. 1618 on a petition for remission or mitigation is an unreviewable exercise of discretion. *United States* v *One 1972 Mercedes-Benz* 250, 545 F. 2d 1233, 1236 (C.A. 9); *United States* v. *One 1972 Toyota Mark II*, 505 F. 2d 1162, 1165 (C.A. 8); *United States* v. *One 1970 Buick Riviera*, *supra*, 463 F. 2d at 1170; *United States* v. *Kemp*, 186 F. 2d 808 (C.A. 10). Moreover, even if judicial review

were available, petitioner's failure to exhaust its administrative remedies precluded the development of a record sufficient to permit even limited review. Compare *Citizens To Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 410, 420.[1]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

MARCH 1978.

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[1]We note that the forfeiture does not affect petitioner's right to full payment from Ercanbrack (J.A. 13). Petitioner has not alleged that Ercanbrack is unable to pay off the loan.

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